

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SANTIAGO PENA-RUIZ,
Plaintiff,
v.
KEVIN S. SOLORZANO,
Defendant.

Civil Action No.
07-2488 (JBS)

**MEMORANDUM
OPINION**

SIMANDLE, District Judge:

This matter is before the Court upon motion of Plaintiff Santiago Pena-Ruiz, for reconsideration of this Court's Order of June 17, 2007, which had dismissed Plaintiff's Complaint as time-barred. Plaintiff now asserts that his claims under 42 U.S.C. § 1983 were subject to equitable tolling and that his Complaint was timely filed. This Court will reconsider its decision based upon this additional information, and finds as follows:

1. On May 20, 2007, Plaintiff SANTIAGO PENA-RUIZ (hereinafter "Plaintiff"), a prisoner currently confined at the Federal Correctional Institution at Florence, Colorado, executed his Complaint under 28 U.S.C. § 1331 (hereinafter "Complaint"), pursuant to the doctrine announced in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), together with Plaintiff's application to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915. See Docket Entry No. 1.

2. Plaintiff named Kevin S. Solorzano as the sole defendant in this action. See id., Caption. Plaintiff alleges that Solorzano sexually assaulted him on two occasions, specifically, on September 27, 2004, and October 7, 2004. See id. at 2.
3. On June 17, 2007, this Court dismissed Plaintiff's Complaint with prejudice as time barred. See Docket Entry No. 2. The Court explained to Plaintiff that the statute of limitations on civil rights claims is governed by the applicable state limitations period for personal injury, see Goodman v. Lukens Steel Co., 482 U.S. 656, 661-62 (1987); Wilson v. Garcia, 471 U.S. 261, 276 (1985); Montgomery v. De Simone, 159 F.3d 120, 126 (3d Cir. 1998); Cito v. Bridgewater Township Police Dept., 892 F.2d 23, 25 (3d Cir. 1989), and that New Jersey's statute of limitations for personal injury claims requires that "an action for an injury to the person caused by a wrongful act, neglect, or default, must be convened within two years of accrual of the cause of action." See id. at 1-2 (quoting Cito, 892 F.2d at 25, quoting, in turn, Brown v. Foley, 810 F.2d 55, 56 (3d Cir. 1987)). The Court further clarified to Plaintiff that, under federal law governing the accrual of claims, "the limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is

the basis of the section 1983 action." See id. at 2 (quoting Montgomery, 159 F.3d at 126, and citing Samerick Corp. of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998)). Finally, the Court noted that "[e]quitabile tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed," see id. (quoting Oshiver v. Levin, 38 F.3d 1380, 1387 (3d Cir. 1994)), and that equitable tolling is appropriate where: (a) the defendant has actively misled the plaintiff, (b) the plaintiff has in some extraordinary way been prevented from asserting his rights, (c) the plaintiff has timely asserted his rights mistakenly in the wrong forum, or (d) the court has misled a party regarding the steps that the party needs to take to preserve a claim. See id. at 3 (citing Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999), and Brinson v. Vaughn, 398 F.3d 225, 230 (3d Cir. 2005)). Pointing out that, according to Plaintiff's Complaint, Plaintiff was assaulted more than two years prior to his submission of the Complaint, this Court: (a) concluded that the Complaint was time barred in view of the fact that Plaintiff's statements did not provide this Court with any valid reason to grant Plaintiff equitable tolling, and (b) issued an order dismissing the Complaint (hereinafter "July Order"). See id. at 3-4.

4. On October 29, 2007, the Court received from Plaintiff his motion for reconsideration of the July Order (hereinafter "Motion") alleging that: (a) his Motion should be deemed timely on the grounds that Plaintiff was not notified about dismissal of his Complaint,¹ see Docket Entry No. 3, at 2,² and (b) his Complaint should be deemed timely on the grounds of equitable tolling, in view of the following facts:
- (i) Defendant's criminal proceedings that took place between July of 2005 and November of 2006,
 - (ii) advice Plaintiff received from -- and concerns expressed by -- the prosecutors in Defendant's criminal action, and

¹ The Court's docket indicates that a hard-copy regular mail notice of the July Order was duly forwarded to Plaintiff by the Office of the Clerk on July 18, 2007, at the address "SANTIAGO PENA-RUIZ #06043-030, FLORENCE FEDERAL CORRECTIONAL INSTITUTION, Inmate Mail/Parcels, PO BOX 6000, FLORENCE, CO 81226."

² Since Plaintiff's Motion consists of: (a) cover letter, (b) a document titled "Motion to Have Plaintiff's Motion for Reconsideration," (c) a copy of Plaintiff's letter dated September 20, 2007, (d) a copy of this Court's docket in Plaintiff's action, (e) a copy of Plaintiff's letter dated October 3, 2007, (f) a document titled "Motion for Reconsideration," (g) a duplicative copy of Plaintiff's letter dated September 20, 2007, (h) a duplicative copy of this Court's docket in Plaintiff's action, (i) a duplicative copy of Plaintiff's letter dated October 3, 2007, and (j) a copy of the docket in Defendant's criminal proceedings, and each of this documents is individually paginated starting with page one, this Court--in order to avoid undue confusion--refers to the particular pages in Plaintiff's Motion by utilizing the pagination automatically generated by CM/ECF filing of the Motion.

(iii) Plaintiff's three transfers among certain correctional facilities operated by the Federal Bureau of Prisons.³ See id. at 11-12.

5. On November 21, 2007, this Court issued an order directing the Clerk to reopen this instant matter in order to entertain Plaintiff's Motion. See Docket Entry No. 4.
6. After thoroughly examining Plaintiff's Motion, the Court concludes that grant of equitable tolling is not warranted.
 - (a) Procedurally, Local Rule 7.1(i) requires that a motion for reconsideration be "served and filed within 10 business days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge." L. Civ. R. 7.1(i). In the instant case, the Court entered judgment in this matter on June 17, 2007, and Plaintiff did not file the present Motion until October 29, 2007, three and a half months later. Plaintiff offers, as an explanation regarding why he failed to file his motion in a timely fashion, or make any request for

³ According to Plaintiff's Motion, one transfer (from a correctional facility in New Jersey to that in California) took place in June of 2005, another transfer (from California to Pennsylvania) took place in May of 2006, and the third transfer (from Pennsylvania to California) took place in December of 2006. See Docket Entry No 3, at 11-12.

an extension of time to file such a motion beyond the ten day window prescribed by the Local Rules, his claim that he did not receive the Clerk's mailing of the Court's June 17 Order addressed to him, even though he did receive all other mailings from the Clerk sent to Plaintiff at the very same address. See Docket Entry No. 3, at 2-3. The Court has no reason to presume that the post office failed to deliver the Clerk's mailing containing a copy of the Court's June 17 Order while properly delivering all other mailings from the Clerk sent to the same address. It cannot be ruled out, however, that the mail was lost or misplaced by others after it arrived at FCI Florence, and the Court will deem the motion timely.⁴

- (b) Turning then to the reconsideration motion, the Court finds Plaintiff has failed to sustain the burden imposed upon him by the standard governing motions for reconsideration. The "purpose of a motion for

⁴ It is especially important that the Court be lenient in enlarging the deadline for reconsideration where the original order under attack was the product of the preliminary review of prisoner complaints filed in forma pauperis under 28 U.S.C. § 1915. The opportunity for the Court to take a second look at its dismissal order through reconsideration of something that may have been unclearly stated in the pro se Complaint clearly advances fairness to the plaintiff.

reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."

Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Accordingly, a motion under Rule 7.1(i) may be granted only if: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. See North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir 1995). Here, Plaintiff does not allege any change in controlling legal authority, nor does he argue that any previously unavailable evidence has come to light, or that the Court committed a clear error of law. Instead, Plaintiff's arguments provide information previously available to Plaintiff but undisclosed to the Court. Normally, this would lead to a finding that Plaintiff failed to meet the requirements for reconsideration. See Harsco Corp., 779 F.2d at 909. Nonetheless, plaintiff is proceeding pro se, his pleadings are to be read with liberality, and he may not have foreseen when drafting his Complaint that it would be subject to dismissal on its face for untimeliness. Accordingly,

he should receive this opportunity to present the factual circumstances surrounding his delay in filing that give rise to equitable tolling. The Court therefore reconsiders its earlier ruling based upon the more complete allegations of Plaintiff.

- (c) Examining Plaintiff's equitable tolling arguments on merits, as if they were made part of Plaintiff's Complaint ab initio, the Court will dismiss the Complaint as untimely for failure to assert valid grounds for equitable tolling. According to the Complaint, Plaintiff suffered a sexual assault by Defendant on two occasions, specifically, on September 27, 2004, and on October 7, 2004, when Defendant allegedly forced Plaintiff to have a sexual intercourse with him. See Docket Entry No. 1, at 2. Therefore, the Court has no reason to presume that Plaintiff was not aware of the alleged wrong committed, and Plaintiff's two-year period of limitations began to run, for the purposes of filing a civil rights action, no later than on October 7, 2004, and, absent equitable tolling, expired on October 6, 2006, that is, *six and a half months prior* to Plaintiff's execution of his Complaint. See Complaint at 5 (indicating that the Complaint was

executed, at the earliest, on May 20, 2007).

Moreover, according to the Complaint, Defendant was arrested and removed from the facility of Plaintiff's confinement on July 20, 2005; such arrest eliminated any potential danger of Defendant's retaliation against Plaintiff fourteen months prior to expiration of Plaintiff's limitations period. See id. at 3. Plaintiff alleges his untimeliness was justified by the following circumstances.

- (i) Plaintiff first asserts that he delayed filing his Complaint because he was waiting for conclusion of Defendant's criminal proceedings (that took place between July of 2005 and November of 2006, with four months between Defendant's conviction and sentencing included). However, the Court is aware of no legal provision requiring a civil rights plaintiff to wait for the conclusion of his prospective defendant's criminal trial. This limitation appears to be self-imposed by Plaintiff and warrants no equitable tolling. Moreover, even if the Court were to hypothesize that Plaintiff was, somehow, prevented from filing of civil action by

Defendant's criminal prosecution, Plaintiff was able to file his civil action timely since Defendant was found guilty by his trial court on July 6, 2006, see Docket Entry No. 3, at 22, that is, three months prior to expiration of Plaintiff's statute of limitations. Plaintiff, however, alleges he felt constrained to postpone the filing of his civil rights Complaint until Defendant was not merely convicted but also sentenced. See id. at 11. Such argument has no merit, since no provision obligates a civil plaintiff to delay filing of his complaint until the putative defendant is sentenced.⁵ Therefore, Plaintiff's assertions that he was waiting for conclusion of Defendant's criminal proceedings do not merit equitable relief.

(ii) Next, Plaintiff alleges that Plaintiff's filing of the instant Complaint was delayed

⁵ Even if this Court were to entertain this argument, Plaintiff's facts do not match his claim, since Defendant was sentenced on November 3, 2006, that is, six and a half months prior to Plaintiff's filing of the instant Complaint. It appears that, had Plaintiff merely waited for Defendant to be sentenced before filing the instant Complaint, Plaintiff could have filed it in November 2006, rather than waiting another half a year.

because of the advice Plaintiff received from -- and concerns expressed by -- the prosecutors in Defendant's criminal action. Specifically, Plaintiff alleges that the prosecutors were concerned about the fact that Plaintiff was expected to be one of government witnesses in Defendant's criminal prosecution.⁶ Plaintiff, however, had no reason to rely on the advice of Defendant's prosecutors, since these prosecutors were not in attorney-client relationship with Plaintiff, and had no basis for rendering any legal advice to Plaintiff. Moreover, even if this Court would equate Defendant's prosecutors with Plaintiff's counsel and, thus, consider their advice as an advice of Plaintiff's attorney, Plaintiff's reliance on their advice does not present grounds for equitable tolling. "Attorney error is not a basis for equitable tolling in the Third Circuit because it does not rise to the level

⁶ It is unclear from the face of Plaintiff's various submissions whether Plaintiff in fact testified as a witness in Defendant's criminal matter. See generally, Docket Entries Nos. 1, 3.

of the extraordinary circumstances which must be present for equitable tolling to apply."

Manning v. Blaine, 2001 U.S. Dist. LEXIS 19122, 2001 WL 1491066, at *2 (E.D. Pa. Nov. 20, 2001); see also Gaynor v. Kyler, 2003 U.S. Dist. LEXIS 20185, at *3 (E.D. Pa. Oct. 24, 2003) (holding that the plaintiff was unable to demonstrate in what "'extraordinary way [he has] been prevented from asserting his rights' as a result of attorney error, deception, or otherwise" and concluding that "equitable tolling does not apply") (quoting Fahy, 240 F.3d at 244). Finally, even if this Court were to ignore the clearly established legal principle that an attorney's error does not provide grounds for equitable tolling, Plaintiff's factual assertions fail to support his legal contentions. Specifically, Defendant's last criminal hearing took place on May 11, 2006, that is, about five months prior to expiration of Plaintiff's statute of limitations. See Docket Entry No. 3, at 22. Therefore, even if Plaintiff was waiting for

Defendant's last hearing to act as a witness against Defendant, he could not have justifiably waited to act well past the date of Defendant's last hearing and, certainly, after Defendant's conviction, both of which took place many months prior to expiration of Plaintiff's period of limitations.

Plaintiff, however, elected to sit on his rights until it was more than a year after Defendant's last criminal hearing, more than ten months after Defendant's conviction, and more than six months after Defendant's sentencing. In view of the foregoing, the Court finds Plaintiff's allegations that he was prevented from filing his Complaint by the advice received from Defendant's prosecutors unavailing. The Court finds no basis for equitable tolling.

- (iii) Finally, Plaintiff maintains that he was prevented from filing a timely complaint by three transfers among certain correctional facilities operated by the Federal Bureau of Prisons. According to Plaintiff, the first transfer (from a correctional facility in New Jersey to that in California) took

place in June of 2005, another transfer (from California to Pennsylvania) took place in May of 2006, and the third transfer (from Pennsylvania to California) took place in December of 2006.⁷ See Docket Entry No. 3, at 12. These allegations do not indicate that Plaintiff was, in some extraordinary way, prevented from asserting his rights, since Plaintiff was staying in each facility from eight to eleven months, and certainly had the opportunity during any one of these stays to produce and submit for filing a document similar in its complexity to his instant five-page long Complaint. Plaintiff has not suggested that his legal materials were lost in these transfers. A contrary finding would render the statute of limitations meaningless, in light of the routine, frequent transfers of prisoners from one facility to another with the Federal Bureau of Prisons and/or state Departments of Corrections. Therefore, the Court concludes that

⁷ Notably, Plaintiff's third transfer has little relevance to Plaintiff's claims, since it took place after his statute of limitations expired. Therefore, for the purpose of rendering on Plaintiff's equitable tolling, the Court must consider only two transfers, one that took place eight months after the period of limitations began to run, and another eleven months thereafter.

Plaintiff's allegations fail to provide the Court with any valid basis for equitable tolling.

CONCLUSION

For the reasons stated above, Plaintiff's motion for reconsideration of the Dismissal Order of June 17, 2007 will be denied, and the accompanying Order will be entered.

s/ Jerome B. Simandle

JEROME B. SIMANDLE
U.S. District Judge